



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 21, 1995

Ms. Kelly B. Holder  
Support Services Supervisor  
Police Department  
City of New Braunfels  
111 West Garden Street  
New Braunfels, Texas 78130-5131

OR95-1576

Dear Ms. Holder:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 29213.

The City of New Braunfels (the "city"), through its police department, has received a request for a certain case file regarding a rape investigation. Specifically, the requestor, who is the rape victim at issue here, seeks information relating to a particular incident "including, but not limited to, polygraph report, all investigation narratives and reports, statements from all witnesses, and the medical reports from McKenna Memorial Hospital and Dr. Flanagan." You have submitted the requested information to us for review and claim that sections 552.101 and 552.108 of the Government Code except it from required public disclosure.

First, we address your assertion that section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law," protects some of the requested information from required public disclosure. Specifically, you claim that section 19A of the Polygraph Examiner's Act, V.T.C.S. article 4413(29cc), excepts some of the requested information. Section 19A provides, in pertinent part:

(b) Except as provided in Subsection (d) of this section, a person for whom a polygraph examination is conducted or an employee of the person may not disclose to another person information acquired from the examination.

V.T.C.S. art. 4413 (29cc), § 19A; *see also* Open Records Decision Nos. 430 (1985), 316 (1982).

We understand that the polygraph information at issue here (Attachment A) relates to an examination conducted for the city. It does not appear that any of the exceptions to non-disclosure apply in this instance. *See* V.T.C.S. art. 4413, § 19 (c), (d). Accordingly, the city must withhold Attachment A from required public disclosure under section 552.101 of the Government Code.

You also assert section 552.101 of the Government Code in conjunction with the rape suspect's privacy interests. Specifically, you seek to withhold personal information relating to the suspect, including the suspect's name, home address, and employer. Information may be withheld on common-law privacy grounds under section 552.101 if it meets the test articulated for section 552.101 by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under the *Industrial Foundation* case, information may be withheld on common-law privacy grounds under section 552.101 only if it is highly intimate or embarrassing and is of no legitimate concern to the public.

The information submitted to us for review relates to an investigation that the city police department conducted into rape allegations. We have examined the submitted investigation file and conclude that it contains information that implicates the privacy interests of the complainant. *See, e.g.*, Open Records Decision No. 393 (1983). This interest, however, is overcome by the special right of access afforded by section 552.023 of the Government Code. *See* Open Records Decision No. 481 (1987) (common-law privacy does not provide a basis for withholding information from its subject). Accordingly, the city may not withhold the investigation file on privacy grounds.

Finally, we consider your various assertions under section 552.108 of the Government Code. Section 552.108 provides that:

(a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure].

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure].

When applying section 552.108, our office has distinguished between cases that are still under active investigation and those that are closed. Open Records Decision No. 611 (1992) at 2. In cases that are still under active investigation, this section excepts from disclosure all information except that generally found on the first page of the offense

report. See generally Open Records Decision No. 127 (1976) (citing *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ *ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976)). As a general matter, once a case is closed, information may be withheld under section 552.108 only if the law enforcement agency demonstrates or the information demonstrates on its face that its release "will unduly interfere with law enforcement and prevention." See Attorney General Opinion MW-446 (1982); Open Records Decision Nos. 434 (1986), 366 (1983) at 3, 216 (1978) at 3 (citing *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). Whether information falls within the section 552.108 exception must be determined on a case-by-case basis. Open Records Decision Nos. 434 (1986) at 2; 287 (1981) at 1-2.

You claim that section 552.108 applies in this instance because the case is not "closed." You advise us that the case is not prosecutable. You say, "we have not determined this case to be 'closed' so much as we cannot find any court willing to prosecute the case" and the statute of limitations for rape has not yet expired. The submitted documents indicate, however, that, although the case is not "closed," it has been inactive for at least six months. You have not demonstrated that any further action on this case is imminent or even planned, nor do the submitted documents so demonstrate on their face. We believe that in this instance, criminal prosecution is too speculative and nebulous to justify withholding the information under section 552.108. See Open Records Decision No. 582 (1990). In addition, the mere fact that the statute of limitations has not expired is not sufficient grounds for excepting the information from required public disclosure under section 552.108. But see Open Records Decision No. 408 (1984). Accordingly, we conclude that you may not withhold the requested information under section 552.108 of the Government Code on the grounds that the case is not "closed."

You also assert section 552.108 of the Government Code on the grounds that release of the requested information would unduly interfere with law enforcement. Specifically, you claim that release of the requested information would (1) reveal investigative techniques and (2) lead to harassment of or retaliation against the rape suspect.

We have examined the information submitted to us for review. You do not indicate, nor have we been able to find, which portions of the case file reveal investigative techniques. With respect to this issue, you have not demonstrated that release of the requested information would unduly interfere with law enforcement.

With respect to your concern that release of the requested information would lead to harassment of or retaliation against the rape suspect, we note that a governmental body may withhold the names and statements of witnesses if the governmental body determines:

from an examination of the facts of the particular case that disclosure might either subject the witnesses to possible intimidation or harassment or harm the prospects of future cooperation between witnesses and law enforcement officers.

Open Records Decision No. 252 (1980) at 4; *see also* Open Records Decision No. 297 (1981) at 2.

In this instance, the witness whom you seek to shield from possible harassment or retaliation is already well known to the complainant. Indeed, the complainant appears to have told the police department of the suspect's whereabouts and has already been given access to most of the investigative materials. Consequently, release of the requested information will pose no greater threat of harassment or retaliation than already exists. We conclude, therefore, that the police department may not withhold the requested case file from required public disclosure under section 552.108 of the Government Code. Except as noted above, the city must release the requested information in its entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, reading "Loretta DeHay". The signature is written in a cursive, flowing style.

Loretta R. DeHay  
Assistant Attorney General  
Open Government Section

LRD/GCK/rho

Ref.: ID# 29213

Enclosures: Submitted documents